

PROJECT COOPERATION AGREEMENT  
BETWEEN  
THE DEPARTMENT OF THE ARMY  
AND  
STATE OF HAWAII  
FOR CONSTRUCTION  
OF THE  
KIKIAOLA LIGHT DRAFT HARBOR NAVIGATION IMPROVEMENTS  
ISLAND OF KAUAI, HAWAII

THIS AGREEMENT entered into this 8th day of August, 2005, by and between the Department of the Army (hereinafter the "Government") represented by the U.S. Army Engineer, Honolulu District and State of Hawaii (hereinafter the "Non-Federal Sponsor"), represented by the Chairperson of the Department of Land and Natural Resources.

WITNESSETH, THAT:

WHEREAS, construction of the Kikiaola Light Draft Harbor Navigation Improvements (hereinafter the "*Project*", as defined in Article I.A. of this Agreement) at Kekaha, Island of Kauai, State of Hawaii, was authorized by Section 101 of the River and Harbor Act of August 13, 1968 (Public Law 90-483);

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Cooperation Agreement (hereinafter the "Agreement") for construction of the *Project*;

WHEREAS, Section 101 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2211), specifies the cost-sharing requirements applicable to the *Project*;

WHEREAS, Section 217(a) of the Water Resources Development Act of 1996, Public Law 104-303 (33 U.S.C. 2326a(a)), provides that the Government may provide additional capacity at a *dredged or excavated material disposal facility* constructed by the Government beyond the capacity that would be required for water resources project purposes, if a non-Federal sponsor agrees to pay all costs associated with the construction of the additional capacity;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. 1962d-5b), and Section 101 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2211), provide, *inter alia*, that the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal interest has entered into a written agreement to furnish its required cooperation for the project or separable element;

WHEREAS, the Government and the Non-Federal Sponsor have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the *Project* in accordance with the terms of this Agreement;

WHEREAS, the Hawaii Department of Health has issued a Water Quality Certificate, dated November 20, 2002, in accordance with the requirements of Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341) subject to submittal of a satisfactory Environmental Protection Plan; and

WHEREAS, the Government and the Non-Federal Sponsor, in connection with this Agreement, desire to foster a partnering strategy and a working relationship between the Government and the Non-Federal Sponsor through a mutually developed formal strategy of commitment and communication embodied herein, which creates an environment where trust and teamwork prevent disputes, foster a cooperative bond between the Government and the Non-Federal Sponsor, and facilitate the successful implementation of the *Project*.

NOW, THEREFORE, the Government and the Non-Federal Sponsor agree as follows:

#### ARTICLE I - DEFINITIONS

A. The term “*Project*” shall mean the *general navigation features*; all *removals* accomplished in accordance with Article II of this Agreement; and all lands, easements, rights-of-way, and *relocations* that the Government, in accordance with Article III of this Agreement, determines to be necessary for construction or operation and maintenance of the *general navigation features*, but shall not include aids to navigation or the *local service facilities*.

B. The term “*general navigation features*” shall mean the *initial general navigation features* and the *subsequent dredged or excavated material disposal facilities*. The *general navigation features* shall consist of the existing east, west, and inner stub rubblemound breakwater structures which shall be modified as described in the reports listed in this paragraph: dredging of a 725-foot long, 105 to 205-foot wide entrance channel to a depth of 11 feet; and dredging of a 320-foot long, 70 to 105-foot wide access channel to a depth of 7 feet and the stockpiling or disposing of the dredged material at one or more of the following locations: Kekaha County Landfill, Kikiaola Beach, and the Kikiaola Land Company Property *dredged or excavated material disposal facilities* at Kekaha, Island of Kauai, as generally described in the report entitled “General Reevaluation Report and Environmental Assessment for Navigation Improvements, Kikiaola Light Draft Harbor, Kekaha, Island of Kauai, Hawaii”, dated August, 1998 and approved by the Assistant Secretary of the Army (Civil Works) on December 15, 1998, the report entitled “Limited Reevaluation Report for Navigation Improvements, Kikiaola Light Draft Harbor, Kekaha, Island of Kauai, Hawaii”, dated September 2003 and approved by the Commander, Pacific Ocean Division on October 24, 2003, and the report entitled “Limited Reevaluation Report for Navigation Improvements, Kikiaola Light Draft Harbor, Kekaha, Island of Kauai, Hawaii”, dated June 2005 and approved by the Commander, Pacific Ocean Division on July 13, 2005. The term does not include any lands, easements, rights-of-way, *relocations*; *removals*; *betterments*; any capacity provided pursuant to II.M.3. of this Agreement; aids to navigation; or *local service facilities*.

C. The term “*initial general navigation features*” shall mean the modification of 764 feet of the existing east breakwater by raising the crest elevation by 3-4 feet and flattening the

seaward slope; modification of 245 feet of the existing west breakwater; removal of 150 feet of the existing outer east breakwater; removal of 71 feet of the existing inner east stub breakwater and reconstruction of the 71-foot long inner east stub breakwater; dredging of a 725-foot long, 105 to 205-foot wide entrance channel to a depth of 11 feet; and dredging of a 320-foot long, 70 to 105-foot wide access channel to a depth of 7 feet and the *dredged or excavated material disposal facilities* other than the *subsequent dredged or excavated material disposal facilities*.

D. The term “*subsequent dredged or excavated material disposal facilities*” shall mean any *dredged or excavated material disposal facilities* that will contain material from the operation and maintenance, but not the construction, of the *initial general navigation features*.

E. The term “*initial period of construction*” shall mean the time from the date that the Government either issues the solicitation for the first construction contract for the *initial general navigation features* or commences construction of the *initial general navigation features* using the Government’s own forces, whichever is earlier, to the date that construction of the *initial general navigation features* is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article XIV or Article XV.D. of this Agreement, whichever is earlier.

F. The term “*subsequent period of construction*” shall mean the time during which the engineering and design or construction is performed on a *subsequent dredged or excavated material disposal facility*. The commencement of each *subsequent period of construction* shall be the date that the Government issues the solicitation for the first contract for any work on such facility, or the date that the Government makes the first financial obligation for the Government’s own forces to perform any work on such facility, whichever is earlier. The end of each *subsequent period of construction* shall be the date that construction of such facility is complete, as determined by the Government, or the date that this Agreement is terminated in accordance with Article XIV or Article XV.D. of this Agreement, whichever is earlier.

G. The term “*total costs of construction of the general navigation features*” shall mean all costs incurred by the Non-Federal Sponsor or the Government in accordance with the terms of this Agreement directly related to construction of the *general navigation features*. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: the Government’s Advanced Engineering and Design costs; the Government’s Preconstruction Engineering and Design costs; the Government’s engineering and design costs during construction; the Non-Federal Sponsor’s and the Government’s costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XV.A. of this Agreement; the Government’s costs of historic preservation activities in accordance with Articles XVIII.A.1. and XVIII.C.1. of this Agreement; the Government’s actual construction costs (including the costs of alteration, lowering, raising, or replacement and attendant demolition of any *bridge over navigable waters of the United States*); the Government’s supervision and administration costs; the Non-Federal Sponsor’s and the Government’s costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; the Government’s costs of contract dispute settlements or awards; in accordance with Article II.L.3. of this Agreement, incidental costs incurred by the Non-Federal Sponsor in accomplishing *removals*; direct and incidental costs of *removals* accomplished by the Government in

accordance with Article II.K. of this Agreement; and the Non-Federal Sponsor's and the Government's costs of audit in accordance with Articles X.B. and X.C. of this Agreement. The term does not include the value of any lands, easements, rights-of-way, or *relocations*; any costs incurred by the Non-Federal Sponsor in accomplishing *removals* other than incidental costs; any financial obligations for operation and maintenance of the *general navigation features*; any costs allocated by the Government to a preexisting Federal or non-Federal navigation project in accordance with Article II.C. of this Agreement; any costs of additional work under Articles II.M.2. and II.M.3. of this Agreement; any costs of dispute resolution under Article VII of this Agreement; any costs of aids to navigation; any costs of construction or operation and maintenance of the *local service facilities*; or the Non-Federal Sponsor's costs of negotiating this Agreement.

H. The term "*total costs of initial construction*" shall mean that portion of *total costs of construction of the general navigation features* incurred for the *initial general navigation features*.

I. The term "*total costs of subsequent construction*" shall mean that portion of *total costs of construction of the general navigation features* incurred for the *subsequent dredged or excavated material disposal facilities*.

J. The term "*financial obligation for initial construction*" shall mean a financial obligation of the Government that results or would result in a cost that is or would be included in *total costs of initial construction*.

K. The term "*financial obligation for subsequent construction*" shall mean a financial obligation of the Government that results or would result in a cost that is or would be included in *total costs of subsequent construction*.

L. The term "*non-Federal proportionate share of financial obligations for initial construction*" shall mean the ratio of the Non-Federal Sponsor's total contribution of funds required by Article II.D. of this Agreement to *total financial obligations for initial construction*, as projected by the Government.

M. The term "*non-Federal proportionate share of financial obligations for subsequent construction*" shall mean the ratio of the Non-Federal Sponsor's contribution of funds required by Article II.F. of this Agreement to *financial obligations for subsequent construction*, as projected by the Government.

N. The term "*highway*" shall mean any highway, roadway, street, or way, including any bridge thereof, that is owned by a public entity.

O. The term "*bridge over navigable waters of the United States*" shall mean a lawful bridge over the navigable waters of the United States, including approaches, fenders, and appurtenances thereto, which is used and operated for the purpose of carrying railroad traffic, or both railroad and *highway* traffic, or if a state, county, municipality, or other political subdivision

is the owner or joint owner thereof, which is used and operated for the purpose of carrying *highway* traffic.

P. The term “*relocation*” shall mean providing a functionally equivalent facility to the owner of a *utility*, cemetery, *highway*, railroad (including any bridge thereof), or public facility, excluding any *bridge over navigable waters of the United States*, when such action is authorized in accordance with applicable legal principles of just compensation or providing a functionally equivalent facility when such action is specifically provided for, and is identified as a *relocation*, in the authorizing legislation for the *Project* or any report referenced therein. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant demolition of the affected facility or part thereof.

Q. The term “*removal*” shall mean eliminating an obstruction (other than a *bridge over the navigable waters of the United States*) where the Government determines, after consultation with the Non-Federal Sponsor, that: 1) elimination is necessary for construction or operation and maintenance of the *general navigation features*, including the borrowing of material or the disposal of dredged or excavated material associated therewith; and 2) the Non-Federal Sponsor or the Government has the legal capability to accomplish elimination of the obstruction at the expense of the owner or operator thereof.

R. The term “*betterment*” shall mean a difference in the engineering and design or construction of an element of the *general navigation features* that results from the application of standards that the Government determines exceed those that the Government would otherwise apply to the engineering and design or construction of that element. The term does not include features in addition to the *general navigation features*, nor does it include capacity provided, pursuant to Article II.M.3. of this Agreement, at any *dredged or excavated material disposal facility* for disposal of dredged or excavated material from outside the *general navigation features*.

S. The term “*dredged or excavated material disposal facility*” shall mean improvements necessary on lands, easements, or rights-of-way to enable the disposal of dredged or excavated material associated with construction or operation and maintenance of the other *general navigation features*. Such improvements may include, but are not necessarily limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, or de-watering pumps or pipes. The term also includes modifications to a dredged or excavated material disposal facility to increase capacity beyond that created by regularly recurring operation and maintenance activities.

T. The term “*over-depth*” shall mean additional dimensions associated with a given depth that are required to accomplish advance maintenance, if any, and to compensate for dredging inaccuracies at that depth.

U. The term “*utility*” shall mean that which is defined as a public utility pursuant to generally applicable law of the State of Hawaii.

V. The term “*Federal program funds*” shall mean funds provided by a Federal agency, other than the Department of the Army, plus any non-Federal contribution required as a matching share therefor.

W. The term “*fiscal year*” shall mean one year beginning on October 1 and ending on September 30.

X. The term “*local service facilities*” shall mean those facilities that the Non-Federal Sponsor must construct or operate and maintain to realize the benefits of the *general navigation features*. The *local service facilities* are the State berthing area; the moorings; the existing launch ramp; all existing interior shoreside revetments; the existing wooden pier; and other existing shoreside facilities, as generally described in the report entitled “Limited Reevaluation Report for Navigation Improvements at Kikiaola Light Draft Harbor, Kekaha, Island of Kauai, Hawaii”, dated June, 2005 and approved by the Commander, Pacific Ocean Division on July 13, 2005.

## ARTICLE II - OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter the “Congress”) and using those funds and funds provided by the Non-Federal Sponsor, shall expeditiously construct the *general navigation features* (including alteration, lowering, raising, or replacement and attendant demolition of any *bridge over navigable waters of the United States*), applying those procedures usually applied to Federal projects, in accordance with Federal laws, regulations, and policies.

1. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Government’s issuance of such solicitations. The Government shall not issue the solicitation for the first construction contract for the *initial general navigation features* or commence construction of the *initial general navigation features* using the Government’s own forces until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the *Project* and the *local service facilities*. To the extent possible, the Government shall afford the Non-Federal Sponsor the opportunity to review and comment on all proposed contract modifications, including change orders. In any instance where providing the Non-Federal Sponsor with notification of a contract modification is not possible prior to execution of the contract modification, the Government shall provide such notification in writing at the earliest date possible. To the extent possible, the Government also shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract claims prior to resolution thereof. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the contents of solicitations, award of contracts or commencement of construction using the Government’s own forces, execution of contract modifications, resolution of contract claims, and performance of all work on the *general navigation features* shall be exclusively within the control of the Government.

2. At the time the U.S. Army Engineer for the Honolulu District (hereinafter the "District Engineer") furnishes the contractor with the Government's Written Notice of Acceptance of Completed Work for each contract for the *general navigation features*, the District Engineer shall furnish the Non-Federal Sponsor with a copy thereof.

B. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, and rights-of-way, including those necessary for the borrowing of material or the disposal of dredged or excavated material, that the Government determines the Non-Federal Sponsor must provide for construction or operation and maintenance of the *general navigation features*, and shall perform or ensure performance of all *relocations* that the Government determines to be necessary for construction or operation and maintenance of the *general navigation features*.

C. The Government shall allocate *total costs of construction of the general navigation features* between *total costs of initial construction* and *total costs of subsequent construction* and shall allocate *total costs of subsequent construction* among the *subsequent periods of construction*. The Government also shall allocate *total costs of initial construction* and *total costs of subsequent construction* to the final dredged depth, excluding associated *over-depth* and entrance channel wave allowances. Finally, the Government shall allocate to any preexisting Federal or non-Federal navigation project all costs associated with the dredging, excavation, and disposal of material from the dimensions, including associated *over-depth* and entrance channel wave allowances, of such project.

D. The Non-Federal Sponsor shall contribute 10 percent of *total costs of initial construction*. If the Government projects that the Non-Federal Sponsor's contributions under paragraph L.3. of this Article and under Articles V, X, and XV.A. of this Agreement that are allocated by the Government to *total costs of initial construction* will be less than the Non-Federal Sponsor's share required by this paragraph, the Non-Federal Sponsor, in accordance with Article VI.B. of this Agreement, shall provide additional funds in the amount necessary to meet the Non-Federal Sponsor's share required by this paragraph.

E. In accordance with Article VI.B. of this Agreement, the Non-Federal Sponsor shall pay 100 percent of the costs allocated by the Government pursuant to paragraph C. of this Article to a preexisting non-Federal navigation project. The Non-Federal Sponsor shall have no obligation under this Agreement to pay any costs allocated by the Government pursuant to paragraph C. of this Article to a preexisting Federal navigation project.

F. The Non-Federal Sponsor shall contribute 10 percent of *total costs of subsequent construction* incurred for each *subsequent period of construction*. If the Government projects that the Non-Federal Sponsor's contributions under paragraph L.3. of this Article and under Articles V, X, and XV.A. of this Agreement that are allocated by the Government to *total costs of subsequent construction* for that *subsequent period of construction* will be less than the Non-Federal Sponsor's share required by this paragraph for that *subsequent period of construction*, the Non-Federal Sponsor, in accordance with Article VI.B. of this Agreement, shall provide additional funds in the amount necessary to meet the Non-Federal Sponsor's share required by this paragraph for that *subsequent period of construction*.

G. In accordance with Article VI.E. of this Agreement, the Non-Federal Sponsor shall pay an additional amount equal to 10 percent of *total costs of construction of the general navigation features* less the amount of credit afforded by the Government for the value of the lands, easements, rights-of-way, and *relocations*. The Non-Federal Sponsor shall not be entitled to reimbursement for any value of lands, easements, rights-of-way, and *relocations* provided or performed pursuant to Article III of this Agreement that exceeds 10 percent of *total costs of construction of the general navigation features*.

H. The District Engineer shall promptly notify the Non-Federal Sponsor in writing of the conclusion of the *initial period of construction* and the conclusion of each *subsequent period of construction*. Upon providing each notification, the Government shall conduct an accounting, in accordance with Article VI of this Agreement, and furnish the results to the Non-Federal Sponsor.

I. The Government, subject to the availability of funds and as it determines necessary, shall operate and maintain the *general navigation features* in accordance with Article VIII of this Agreement. The Government shall be responsible for all financial obligations for operation and maintenance of the *general navigation features*.

J. The Non-Federal Sponsor shall not use *Federal program funds* to meet any of its obligations for the *Project* under this Agreement unless the Federal agency providing the Federal portion of such funds verifies in writing that expenditure of funds for such purpose is expressly authorized by Federal law.

K. The Government shall accomplish all *removals* that the Non-Federal Sponsor has the legal capability to accomplish where the Non-Federal Sponsor makes a written request for the Government to accomplish such *removals*. Further, the Government shall accomplish all *removals* that the authorizing legislation for the *Project*, or any report referenced therein, expressly requires the Government to accomplish.

1. All costs incurred by the Government in accomplishing *removals* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

2. However, in the event a court determines that the owner of an obstruction is entitled to payment of just compensation as the result of elimination of the obstruction, such *removal* shall be reclassified as part of the Non-Federal Sponsor's responsibility to provide lands, easements, and rights-of-way, or to perform or ensure performance of *relocations*, as applicable, pursuant to Article II.B. of this Agreement.

L. The Non-Federal Sponsor shall accomplish all *removals*, other than those *removals* specifically assigned to the Government by paragraph K. of this Article, in accordance with the provisions of this paragraph.



1. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such *removals*, in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with accomplishing such *removals*. Unless the Government agrees to a later date in writing, prior to the issuance of the solicitation for each Government contract for construction or operation and maintenance of the *general navigation features*, or prior to the Government incurring any financial obligation for construction or operation and maintenance of the *general navigation features* using the Government's own forces, the Non-Federal Sponsor shall accomplish all *removals* set forth in such descriptions that the Government determines to be necessary for that work.

2. In the event a court determines that the owner of an obstruction is entitled to payment of just compensation as the result of elimination of the obstruction, such *removal* shall be reclassified as part of the Non-Federal Sponsor's responsibility to provide lands, easements, and rights-of-way, or to perform or ensure performance of *relocations*, as applicable, pursuant to Article II.B. of this Agreement.

3. The documented incidental costs incurred by the Non-Federal Sponsor in accomplishing *removals* shall be included in *total costs of construction of the general navigation features*, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs, and shared in accordance with the provisions of this Agreement. Incidental costs may include legal and administrative costs (such as owner or operator notification costs, public notice or hearing costs, attorney's fees, and litigation costs) incurred by the Non-Federal Sponsor in accomplishing *removals*, but shall not include any costs that the Non-Federal Sponsor has the legal capability to require of, assign to, or recover from the owner or operator of the obstruction.

M. The Non-Federal Sponsor may request the Government to perform or provide, on behalf of the Non-Federal Sponsor, one or more of the services (hereinafter the "additional work") described in this paragraph. Such requests shall be in writing and shall describe the additional work requested to be performed or provided. If in its sole discretion the Government elects to perform or provide the requested additional work or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs of the additional work performed or provided by the Government under this paragraph and shall pay all such costs in accordance with Article VI.F. of this Agreement.

1. Acquisition of lands, easements, or rights-of-way or performance of *relocations* for the *general navigation features*. Notwithstanding the acquisition of lands, easements, or rights-of-way or performance of *relocations* by the Government, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XV.D. of this Agreement.

2. Inclusion of *betterments* in the engineering and design or construction of the *general navigation features*. In the event the Government elects to include any such *betterments*,

the Government shall allocate the costs of the *general navigation features* that include *betterments* between *total costs of construction of the general navigation features* and the costs of the *betterments*.

3. Provision of capacity at a *dredged or excavated material disposal facility* for dredged or excavated material from outside the *general navigation features*. In the event the Government elects to provide such capacity, the Government shall allocate the costs of engineering and design, or construction of that *dredged or excavated material disposal facility* between *total costs of construction of the general navigation features* and the costs of such extra capacity. The Government also shall allocate any operation and maintenance costs of that *dredged or excavated material disposal facility* between the costs of operation and maintenance for the *general navigation features* and the costs of such extra capacity.

4. Engineering and design, construction, or operation and maintenance of the *local service facilities* in conjunction with the engineering and design, construction, or operation and maintenance of the associated *general navigation features*. Notwithstanding the performance of this additional work by the Government, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for any costs of cleanup and response in accordance with Article XV.D. of this Agreement.

N. Subject to applicable Federal laws and regulations, the Non-Federal Sponsor, at no cost to the Government and in a timely manner, shall construct or cause to be constructed the *local service facilities*, including dredging, excavation, and disposal of material therefrom, and shall be responsible for taking all actions to enable such construction. The Government shall have no obligation under this Agreement for construction of the *local service facilities* or construction of any other facilities to be provided by the Non-Federal Sponsor or a third party.

O. In accordance with Article VIII.D. of this Agreement, the Non-Federal Sponsor, at no cost to the Government, shall operate and maintain or cause to be operated and maintained the *local service facilities*, including dredging, excavation, and disposal of material therefrom. The Government shall have no obligation under this Agreement for operation and maintenance of the *local service facilities* or operation and maintenance of any other facilities to be provided by the Non-Federal Sponsor or a third party.

P. The Non-Federal Sponsor, upon receipt of notice from the District Engineer of the conclusion of the period of construction, shall construct, operate and maintain or cause to be constructed, operated or maintained a sand bypass program for so long as the Project remains authorized. The Non-Federal Sponsor may, in its discretion or if required by state authority, commence construction and operation of the sand bypass program at any time prior to or during construction of the Project, provided such earlier sand bypass construction or operation does not impede or interfere with construction of the Project. The Non-Federal Sponsor shall also repair or cause to be repaired the west breakwater root as described in the Limited Reevaluation Report dated June 2005 and approved by the Commander, Pacific Ocean Division on July 13, 2005. The repair work shall not impede or interfere with construction of the Project. The Government shall have no obligation under this Agreement for any costs incurred pursuant to this paragraph.

ARTICLE III - LANDS, RELOCATIONS, AND COMPLIANCE WITH PUBLIC LAW 91-646, AS AMENDED

A. The Government, after consultation with the Non-Federal Sponsor, shall determine the lands, easements, and rights-of-way necessary for construction or operation and maintenance of the *general navigation features*, including those necessary for the borrowing of material, the disposal of dredged or excavated material, and *relocations*, and including those that the Government determines to be subject to the navigation servitude. The Government also shall determine which of such lands, easements, and rights-of-way are necessary for the *initial general navigation features* and which are necessary for the *subsequent dredged or excavated material disposal facilities*. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the Non-Federal Sponsor must provide, in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with acquisition of such lands, easements, and rights-of-way. Prior to the issuance of the solicitation for each Government contract for construction or operation and maintenance of the *general navigation features*, or prior to the Government incurring any financial obligation for construction or operation and maintenance of a *general navigation feature* using the Government's own forces, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way the Government determines the Non-Federal Sponsor must provide for that work and shall provide the Government with authorization for entry thereto. Furthermore, prior to the end of the *initial period of construction*, or prior to the end of any *subsequent period of construction*, as applicable, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way necessary for construction or operation and maintenance of the applicable *general navigation features*, as set forth in such descriptions, and shall provide the Government with authorization for entry thereto. For so long as the *Project* remains authorized, the Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the operation and maintenance of the *general navigation features* and that were provided by the Non-Federal Sponsor are retained in public ownership for uses compatible with the authorized purposes of the *Project*.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the *relocations* necessary for construction or operation and maintenance of the *general navigation features*, including those necessary to enable the borrowing of material or the disposal of dredged or excavated material. The Government also shall determine which of such *relocations* are necessary for the *initial general navigation features* and which are necessary for the *subsequent dredged or excavated material disposal facilities*. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such *relocations* in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with such *relocations*. Prior to the issuance of the solicitation for each Government contract for construction or operation and maintenance of the *general navigation features*, or prior to the Government incurring any financial obligation for construction or operation and maintenance of a *general navigation feature* using the Government's own forces,

the Non-Federal Sponsor shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all *relocations* the Government determines to be necessary for that work.

C. The Non-Federal Sponsor shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended (42 U.S.C. 4601-4655), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way necessary for construction or operation and maintenance of the *general navigation features* and the *local service facilities*, including those necessary for *relocations*, the borrowing of material, or the disposal of dredged or excavated material, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

#### ARTICLE IV - CREDIT FOR VALUE OF LANDS AND RELOCATIONS

A. To determine the additional amount owed by the Non-Federal Sponsor pursuant to Article II.G. of this Agreement, the Government shall afford credit toward an amount equal to 10 percent of *total costs of construction of the general navigation features* for the value of the lands, easements, and rights-of-way that the Non-Federal Sponsor must provide pursuant to Article III of this Agreement, and for the value of the *relocations* that the Non-Federal Sponsor must perform or for which it must ensure performance pursuant to Article III of this Agreement. However, no credit shall be afforded for the value of any lands, easements, rights-of-way, or *relocations* that have been provided previously as an item of cooperation for another Federal project. In addition, no credit shall be afforded for the value of lands, easements, rights-of-way, or *relocations* that were acquired or performed using *Federal program funds* unless the Federal agency providing the Federal portion of such funds verifies in writing that affording credit for the value of such items is expressly authorized by Federal law.

B. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the value of any contribution provided pursuant to Article III.A. or III.B. of this Agreement. Upon receipt of such documents, the Government in a timely manner shall determine the value of such contribution for the purpose of determining the amount of credit to be afforded in accordance with the provisions of this Article.

C. For the sole purpose of determining the amount of credit to be afforded in accordance with this Agreement and except as otherwise provided in paragraph D. of this Article, the value of lands, easements, and rights-of-way, including those necessary for the *relocations*, borrowing of material, and the disposal of dredged or excavated material, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The fair market value of lands, easements, or rights-of-way owned by the Non-Federal Sponsor on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the Non-Federal Sponsor provides the

Government with authorization for entry thereto. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

2. General Valuation Procedure. Except as provided in paragraph C.3. or C.5. of this Article, the fair market value of lands, easements, or rights-of-way shall be determined in accordance with the provisions of this paragraph.

a. The Non-Federal Sponsor shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the Non-Federal Sponsor and the Government. The Non-Federal Sponsor shall provide the Government with the appraisal no later than 6 months after the Non-Federal Sponsor provides the Government with an authorization for entry for such real property interest. The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. The fair market value shall be the amount set forth in the Non-Federal Sponsor's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's appraisal, the Non-Federal Sponsor may obtain a second appraisal, and the fair market value shall be the amount set forth in the Non-Federal Sponsor's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's second appraisal, the Non-Federal Sponsor chooses not to obtain a second appraisal, or the Non-Federal Sponsor does not provide the first appraisal as required in this paragraph, the Government shall obtain an appraisal, and the fair market value shall be the amount set forth in the Government's appraisal, if such appraisal is approved by the Non-Federal Sponsor. In the event the Non-Federal Sponsor does not approve the Government's appraisal, the Government, after consultation with the Non-Federal Sponsor, shall consider the Government's and the Non-Federal Sponsor's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

b. Where the amount paid or proposed to be paid by the Non-Federal Sponsor for the real property interest exceeds the amount determined pursuant to paragraph C.2.a. of this Article, the Government, at the request of the Non-Federal Sponsor, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the Non-Federal Sponsor, may approve in writing an amount greater than the amount determined pursuant to paragraph C.2.a. of this Article, but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the Non-Federal Sponsor, but no less than the amount determined pursuant to paragraph C.2.a. of this Article.

3. Eminent Domain Valuation Procedure. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted after the effective date of this Agreement, the Non-Federal Sponsor, prior to instituting such proceedings, shall submit to the Government notification in writing of its intent to institute such proceedings and an appraisal of the specific real property interests to be acquired in such proceedings. The Government shall have 60 days after receipt of such a notice and appraisal within which to review the appraisal, if not previously approved by the Government in writing.

a. If the Government previously has approved the appraisal in writing, or if the Government provides written approval of, or takes no action on, the appraisal within such 60 day period, the Non-Federal Sponsor shall use the amount set forth in such appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

b. If the Government provides written disapproval of the appraisal, including the reasons for disapproval, within such 60 day period, the Government and the Non-Federal Sponsor shall consult in good faith to promptly resolve the issues or areas of disagreement that are identified in the Government's written disapproval. If, after such good faith consultation, the Government and the Non-Federal Sponsor agree as to an appropriate amount, then the Non-Federal Sponsor shall use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. If, after such good faith consultation, the Government and the Non-Federal Sponsor cannot agree as to an appropriate amount, then the Non-Federal Sponsor may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

c. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted in accordance with paragraph C.3. of this Article, fair market value shall be either the amount of the court award for the real property interests taken, to the extent the Government determined such interests are necessary for construction or operation and maintenance of the *general navigation features*, or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

4. Incidental Costs. For lands, easements, or rights-of-way acquired by the Non-Federal Sponsor within a five year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. In the event the Government modifies its determination made pursuant to Article III.A. of this Agreement, the Government shall afford credit for the documented incidental costs associated with preparing to acquire the lands, easements, or rights-of-way identified in the original determination, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such incidental costs shall include, but are not necessarily limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, mapping costs, actual amounts expended for payment of any relocation assistance benefits provided in accordance with Article III.C. of this Agreement, and other payments by the Non-Federal Sponsor for items that are generally recognized as compensable, and required to be paid, by applicable state law due to the acquisition of a real property interest in accordance with Article III of this Agreement. The value of the interests provided by the Non-Federal Sponsor in accordance with Article III.A. of this Agreement shall also include the documented costs of obtaining appraisals prepared for crediting purposes pursuant to paragraph C.2.a. of this Article, as determined by the Government, and subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

5. Waiver of Appraisal. Except as required by paragraph C.3. of this Article, the Government may waive the requirement for an appraisal for the purpose of determining the value of a real property interest for crediting purposes if it determines that an appraisal is unnecessary because the valuation is uncomplicated and that the estimated fair market value of the real property interest is \$10,000 or less based upon a review of available data. In such event, the Government and the Non-Federal Sponsor must agree in writing to the value of such real property interest in an amount not in excess of \$10,000.

D. For the sole purpose of determining the amount of credit to be afforded in accordance with this Agreement, the value of lands, easements, and rights-of-way, including those necessary for *relocations*, the borrowing of material, and the disposal of dredged or excavated material, that the Government acquires on behalf of the Non-Federal Sponsor pursuant to Article II.M.1. of this Agreement shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. The fair market value of such real property interests shall be the amount paid by the Government.

2. The value of the interest shall include the documented incidental costs of acquiring the interest. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey costs, attorney's fees, plat maps, mapping costs, and actual amounts expended for payment of any relocation assistance benefits in accordance with Public Law 91-646, as amended.

E. After consultation with the Non-Federal Sponsor, the Government shall determine the value of *relocations* in accordance with the provisions of this paragraph.

1. For a *relocation* other than a *highway* or a *utility*, the value shall be only that portion of *relocation* costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

2. For a *relocation* of a *highway*, the value shall be only that portion of *relocation* costs that would be necessary to accomplish the *relocation* in accordance with the design standard that the State of Hawaii would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

3. For a *relocation* of a *utility*, the value shall be only that portion of *relocation* costs borne by the Non-Federal Sponsor that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

4. *Relocation* costs shall include, but not necessarily be limited to, actual costs of performing the *relocation*; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with performance of the

*relocation*, as determined by the Government. *Relocation* costs shall not include any additional cost of using new material when suitable used material is available. *Relocation* costs shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

F. Any credit afforded for the value of *relocations* performed within the *Project* boundaries is subject to satisfactory compliance with applicable Federal labor laws covering non-Federal construction, including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)). Crediting may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

## ARTICLE V - PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the Non-Federal Sponsor and the Government, not later than 30 days after the effective date of this Agreement, shall appoint named senior representatives to a Project Coordination Team. Thereafter, the Project Coordination Team shall meet regularly until the end of the *initial period of construction* and during each *subsequent period of construction*. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the Non-Federal Sponsor's counterpart shall keep the Project Coordination Team informed of the progress of construction and of significant pending issues and actions, and shall seek the views of the Project Coordination Team on matters that the Project Coordination Team generally oversees.

C. Until the end of the *initial period of construction* and during each *subsequent period of construction*, as applicable, the Project Coordination Team shall generally oversee the *Project*, including but not necessarily limited to matters related to: engineering and design; plans and specifications; scheduling; real property, *relocation*, and *removal* requirements; real property acquisition; contract awards or modifications; contract costs; the application of and compliance with 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)) for *relocations*; the Government's cost projections; final inspection of the entire *Project* or functional portions of the *Project*; preparation of the management plan for proposed dredged or excavated material disposal; anticipated requirements for operation and maintenance of the *general navigation features*; and other matters related to the *Project*. The Project Coordination Team shall also generally oversee the coordination of schedules for the *Project* and the *local service facilities*. Oversight of the *Project* shall be consistent with a project management plan developed by the Government after consultation with the Non-Federal Sponsor.



D. The Project Coordination Team may make recommendations that it deems warranted to the District Engineer on matters related to the *Project* that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for construction of the *general navigation features*, has the discretion to accept or reject, in whole or in part, the Project Coordination Team's recommendations.

E. The Non-Federal Sponsor's costs of participation in the Project Coordination Team shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. The Government's costs of participation in the Project Coordination Team shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

## ARTICLE VI - METHOD OF PAYMENT

A. In accordance with the provisions of this paragraph, the Government shall maintain current records of, and provide to the Non-Federal Sponsor current projections of, costs, financial obligations, contributions provided by the parties, and credit afforded for the value of lands, easements, rights-of-way, and *relocations*. As of the effective date of this Agreement, *total costs of construction of the general navigation features* are projected to be \$7,853,000, *total costs of initial construction* are projected to be \$7,853,000, the Non-Federal Sponsor's contribution of funds required by Article II.D. of this Agreement is projected to be \$785,000, the *non-Federal proportionate share of financial obligations for initial construction* is projected to be ten (10) percent, the costs allocated by the Government to a preexisting non-Federal navigation project and the Non-Federal Sponsor's contribution of funds required by Article II.E. of this Agreement are projected to be \$0, the Government's total financial obligations for additional work to be incurred through the end of the *initial period of construction* and the Non-Federal Sponsor's contribution of funds for such obligations required by Article II.M. of this Agreement are projected to be \$0, 10 percent of *total costs of construction of the general navigation features* as of the end of the *initial period of construction* is projected to be \$785,000, the credit to be afforded for the value of lands, easements, rights-of-way, and *relocations* to be provided or performed through the end of the *initial period of construction* is projected to be \$106,000, the additional amount required by Article II.G. of this Agreement as of the end of the *initial period of construction* is projected to be \$679,000, *total costs of subsequent construction* are projected to be \$0, the Non-Federal Sponsor's total contribution of funds required by Article II.F. of this Agreement for all *subsequent periods of construction* is projected to be \$0, and the Government's total financial obligations for the additional work to be incurred after the *initial period of construction* and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.M. of this Agreement are projected to be \$0. These amounts and percentage are estimates subject to adjustment by the Government, after consultation with the Non-Federal Sponsor, and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

1. By February 2006 and by each quarterly anniversary thereof until the conclusion of the *initial period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total costs of construction of the general navigation features; total costs of initial construction; the Non-Federal Sponsor's total contribution of funds required by Article II.D. of this Agreement; the non-Federal proportionate share of financial obligations for initial construction; the costs allocated by the Government to a preexisting non-Federal navigation project and the Non-Federal Sponsor's contribution of funds required by Article II.E. of this Agreement; the Government's total financial obligations for additional work incurred through the end of the initial period of construction and the Non-Federal Sponsor's contribution of funds for such obligations required by Article II.M. of this Agreement; the total contribution of funds required from the Non-Federal Sponsor for the forthcoming fiscal year; 10 percent of total costs of construction of the general navigation features as of the date of the final accounting for the initial period of construction; the credit to be afforded for the value of lands, easements, rights-of-way, and relocations to be provided or performed through the end of the initial period of construction; the additional amount required by Article II.G. of this Agreement as of the end of the initial period of construction; the annual installments calculated in accordance with paragraph E. of this Article; total costs of subsequent construction; the Non-Federal Sponsor's total contribution of funds required by Article II.F. of this Agreement for all subsequent periods of construction; and the Government's total financial obligations for additional work incurred after the initial period of construction and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.M. of this Agreement.*

2. By February 2006 and by each quarterly anniversary thereof during each *subsequent period of construction* and until resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of the following: *total costs of construction of the general navigation features; total costs of initial construction; total costs of subsequent construction; the Non-Federal Sponsor's contribution of funds required by Article II.F. of this Agreement for all subsequent periods of construction; total costs of subsequent construction incurred for that subsequent period of construction; the Non-Federal Sponsor's contribution of funds required by Article II.F. of this Agreement for that subsequent period of construction; the non-Federal proportionate share of financial obligations for subsequent construction for that subsequent period of construction; the Government's total financial obligations for additional work incurred during that subsequent period of construction and the Non-Federal Sponsor's contribution of funds for such costs required by Article II.M. of this Agreement; the total contribution of funds required from the Non-Federal Sponsor for the forthcoming fiscal year; 10 percent of total costs of construction of the general navigation features as of the date of the final accounting for that subsequent period of construction; the credit to be afforded for the value of lands, easements, rights-of-way, and relocations to be provided or performed through the end of that subsequent period of construction; and the additional amount required by Article II.G. of this Agreement as of the end of that subsequent period of construction.*

B. The Non-Federal Sponsor shall provide the contributions of funds required by Articles II.D., II.E., and II.F. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 45 calendar days prior to the scheduled date for either issuance of the solicitation for the first contract for construction of the *initial general navigation features* or commencement of construction of the *initial general navigation features* using the Government's own forces, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government determines to be required from the Non-Federal Sponsor to meet: (a) the *non-Federal proportionate share of financial obligations for initial construction* incurred prior to the commencement of the *initial period of construction*; (b) the Government's financial obligations for costs allocated by the Government to a preexisting non-Federal navigation project incurred prior to the commencement of the *initial period of construction*; (c) the projected *non-Federal proportionate share of financial obligations for initial construction* through the first *fiscal year*; and (d) the Government's projected financial obligations for costs allocated by the Government to a preexisting non-Federal navigation project through the first *fiscal year*. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, Honolulu" to the District Engineer, or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor, or by presenting the Government with an irrevocable letter of credit acceptable to the Government for the required funds, or by providing an Electronic Funds Transfer of the required funds in accordance with procedures established by the Government.

2. Thereafter, until the construction of all the *general navigation features* is complete, the Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the beginning of each *fiscal year* in which the Government projects that it will make financial obligations for engineering and design or construction of the *general navigation features*, of the funds the Government determines to be required from the Non-Federal Sponsor to meet: (a) the projected *non-Federal proportionate share of financial obligations for initial construction* for that *fiscal year*; (b) the Government's projected financial obligations for costs allocated by the Government to a preexisting non-Federal navigation project for that *fiscal year*; and (c) the *non-Federal proportionate share of financial obligations for subsequent construction* for that *fiscal year*. No later than 30 calendar days prior to the beginning of that *fiscal year*, the Non-Federal Sponsor shall make the full amount of the required funds for that *fiscal year* available to the Government through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover: (a) the *non-Federal proportionate share of financial obligations for initial construction* incurred prior to the commencement of the *initial period of construction*; (b) the *non-Federal proportionate share of financial obligations for initial construction* as *financial obligations for initial construction* are incurred; (c) the full amount of the Government's financial obligations for costs allocated by the Government to a preexisting non-Federal navigation project as those financial obligations are

incurred; and (d) the *non-Federal proportionate share of financial obligations for subsequent construction as financial obligations for subsequent construction* are incurred. If at any time the Government determines that additional funds will be needed from the Non-Federal Sponsor to cover the Non-Federal Sponsor's share of such financial obligations in the current *fiscal year*, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 60 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of the additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

C. Upon conclusion of the *initial period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall conduct a final accounting for the *initial period of construction* and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting for the *initial period of construction* from being conducted in a timely manner, the Government shall conduct an interim accounting for the *initial period of construction* and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings for the *initial period of construction* are resolved, the Government shall amend the interim accounting for the *initial period of construction* to complete the final accounting for the *initial period of construction* and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The final or interim accounting, as applicable, for the *initial period of construction* shall determine *total costs of initial construction* and the costs allocated by the Government for operation and maintenance of any preexisting non-Federal navigation project as of the date of such accounting. In addition, for each set of costs, the final or interim accounting, as applicable, for the *initial period of construction* shall determine each party's required share thereof and each party's total contributions thereto as of the date of such accounting.

1. Should the final or interim accounting, as applicable, for the *initial period of construction* show that the Non-Federal Sponsor's total required shares of *total costs of initial construction* and the costs allocated by the Government to a preexisting non-Federal navigation project exceed the Non-Federal Sponsor's total contributions provided thereto, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, Honolulu" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the final or interim accounting, as applicable, for the *initial period of construction* show that the total contributions provided by the Non-Federal Sponsor for *total costs of initial construction* and for the costs allocated by the Government to a preexisting non-Federal navigation project exceed the Non-Federal Sponsor's total required shares thereof, the Government, subject to the availability of funds, shall refund the excess to the Non-Federal Sponsor no later than 90 calendar days after providing written notice. In the event funds are not available to refund the excess to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund. To the extent that such appropriations are

not received, the Government shall apply the excess toward the Non-Federal Sponsor's upcoming installment payment, if any, in accordance with paragraph E. of this Article.

D. Upon conclusion of each *subsequent period of construction* and resolution of all relevant claims and appeals and eminent domain proceedings, the Government shall conduct a final accounting for such *subsequent period of construction* and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. If outstanding relevant claims and appeals or eminent domain proceedings prevent a final accounting for such *subsequent period of construction* from being conducted in a timely manner, the Government shall conduct an interim accounting for such *subsequent period of construction* and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings for such *subsequent period of construction* are resolved, the Government shall amend the interim accounting for such *subsequent period of construction* to complete the final accounting for such *subsequent period of construction* and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. The final or interim accounting, as applicable, for such *subsequent period of construction* shall determine *total costs of subsequent construction* for that *subsequent period of construction*, each party's required share thereof, and each party's total contributions thereto as of the date of such accounting.

1. Should the final or interim accounting, as applicable, for such *subsequent period of construction* show that the Non-Federal Sponsor's total required share of *total costs of subsequent construction* for that *subsequent period of construction* exceeds the Non-Federal Sponsor's total contributions provided thereto, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, Honolulu" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. Should the final or interim accounting, as applicable, for such *subsequent period of construction* show that the total contributions provided by the Non-Federal Sponsor for *total costs of subsequent construction* for that *subsequent period of construction* exceed the Non-Federal Sponsor's total required share thereof, the Government, subject to the availability of funds, shall refund the excess to the Non-Federal Sponsor no later than 90 calendar days after providing written notice. In the event funds are not available to refund the excess to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund. To the extent that such appropriations are not received, the Government shall apply the excess toward the Non-Federal Sponsor's upcoming installment payment, if any, in accordance with paragraph E. of this Article.

E. The Non-Federal Sponsor shall pay, with interest, any additional amount required by Article II.G. of this Agreement in accordance with the provisions of this paragraph.

1. Each time the Government conducts a final or interim accounting for the *initial period of construction* and for each *subsequent period of construction*, the Government shall determine:

a. an amount equal to 10 percent of *total costs of construction of the general navigation features* as of the end of the *initial period of construction* or the most recent *subsequent period of construction*, whichever is latest;

b. the value, in accordance with Article IV of this Agreement, of the lands, easements, rights-of-way, and *relocations* provided or performed pursuant to Article III of this Agreement as of the end of the *initial period of construction* or the most recent *subsequent period of construction*, whichever is latest; and

c. the additional amount to be paid by the Non-Federal Sponsor as of the end of the *initial period of construction* or the most recent *subsequent period of construction*, whichever is latest. The additional amount is equal to the amount determined pursuant to paragraph E.1.a. of this Article reduced by the credit afforded for the value of the lands, easements, rights-of-way, and *relocations* determined pursuant to paragraph E.1.b. of this Article. In the event the result of the aforesaid calculation is a negative number, the additional amount shall be zero.

2. At the time of the first final or interim accounting in which the Government determines that the additional amount is greater than zero, the Government shall calculate annual installments for payment of the additional amount, and such annual installments shall be substantially equal. To calculate the annual installments, the Government shall amortize the additional amount over a period of 30 years (hereinafter the “payment period”), beginning on the date the Government notifies the Non-Federal Sponsor of the additional amount, using an interest rate determined by the Secretary of the Treasury in accordance with this paragraph. The Government shall notify the Non-Federal Sponsor in writing of the additional amount and the annual installments.

a. If the calculation that first determined that the additional amount is greater than zero was based upon the final or interim accounting for the *initial period of construction*, the Secretary of the Treasury, in determining the interest rate used to calculate the annual installments, shall take into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods of maturity comparable to the payment period during the month preceding the *fiscal year* in which the *initial period of construction* commences, plus a premium of one-eighth of one percentage point for transaction costs.

b. If the calculation that first determined the additional amount is greater than zero was based upon the final or interim accounting for a *subsequent period of construction*, the Secretary of the Treasury, in determining the interest rate used to calculate the annual installments, shall take into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods of maturity comparable to the payment period during the month preceding the *fiscal year* in which such *subsequent period of construction* commences, plus a premium of one-eighth of one percentage point for transaction costs.

3. Thereafter, at the time of each subsequent final or interim accounting until the payment period has elapsed, the Government shall recalculate the annual installments by amortizing the outstanding portion of the additional amount over the remaining portion of the payment period using an interest rate determined by the Secretary of the Treasury, taking into consideration such average market yields on outstanding marketable obligations of the United States with remaining periods of maturity comparable to the remaining portion of the payment period during the month preceding the *fiscal year* in which the recalculation is made, plus a premium of one-eighth of one percentage point for transaction costs. The Government shall notify the Non-Federal Sponsor in writing of the recalculated additional amount and the recalculated annual installments and the Non-Federal Sponsor shall pay the recalculated annual installments in lieu of the previous annual installments.

4. Thereafter, at the time of each final or interim accounting after the payment period has elapsed, the Government shall notify the Non-Federal Sponsor in writing of the recalculated additional amount. The Non-Federal Sponsor, not later than 90 days from receipt of such notice, shall pay to the Government the outstanding portion of the additional amount by delivering a check payable to "FAO, USAED, Honolulu" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

5. In addition to any recalculation of the annual installments in accordance with paragraph E.3. of this Article, the Government shall recalculate the annual installments at five year intervals by amortizing the outstanding portion of the additional amount over the remaining portion of the payment period using an interest rate determined by the Secretary of the Treasury, taking into consideration such average market yields on outstanding marketable obligations of the United States with remaining periods of maturity comparable to the payment period during the month preceding the *fiscal year* in which the recalculation is made, plus a premium of one-eighth of one percentage point for transaction costs. The Government shall notify the Non-Federal Sponsor in writing of the recalculated annual installments and the Non-Federal Sponsor shall pay the recalculated annual installments in lieu of the previous annual installments.

6. Subject to paragraphs C.2., D.2., and F.3.b. of this Article, the Non-Federal Sponsor shall pay the installments calculated or recalculated pursuant to paragraphs E.2., E.3., or E.5. of this Article each year on the anniversary of the date the Government notifies the Non-Federal Sponsor of the additional amount, over a period not to exceed the payment period, by delivering a check payable to "FAO, USAED, Honolulu" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

7. Notwithstanding paragraph E.6. of this Article, the Non-Federal Sponsor, in its sole discretion, may prepay the additional amount, in whole or in part, at any time. Notwithstanding paragraphs E.2., E.3., or E.5. of this Article, there shall be no charges for interest on any portion of the additional amount that is paid within 90 days after the Government notifies the Non-Federal Sponsor of the additional amount, nor shall there be interest charges on any portion of an increase to the additional amount that is caused by recalculation of the additional amount and that is paid within 90 days after the Government notifies the Non-Federal Sponsor of such recalculated additional amount.

8. If the Government determines that the Non-Federal Sponsor has made payments towards the additional amount that exceed the additional amount, the Government, subject to the availability of funds, shall refund the amount of the excess, without interest. In the event funds are not available to make such refund, the Government shall seek such appropriations as are necessary to make such refund.

F. The Non-Federal Sponsor shall provide the contribution of funds required by Article II.M. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 45 calendar days prior to the scheduled date for the first financial obligation for additional work, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and of the full amount of funds the Government determines to be required from the Non-Federal Sponsor to cover the costs of the additional work. No later than 30 calendar days prior to the Government incurring any financial obligation for additional work, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required to cover the costs of such additional work through any of the payment mechanisms specified in paragraph B.1. of this Article.

2. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. If at any time the Government determines that the Non-Federal Sponsor must provide additional funds to pay for such additional work, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days from receipt of such notice, the Non-Federal Sponsor shall provide the Government with the full amount of the additional required funds through any of the payment mechanisms specified in paragraph B.1. of this Article.

3. At the time the Government conducts the final or interim accounting, as applicable, for the *initial period of construction* or the final or interim accounting, as applicable, for each *subsequent period of construction* or at the end of each *fiscal year* in which the Government incurs costs for additional work provided or performed prior to the *initial period of construction* or after all *subsequent periods of construction*, the Government shall conduct an accounting of the Government's financial obligations for additional work incurred during the applicable period and furnish the Non-Federal Sponsor with written notice of the results of such accounting. If outstanding relevant claims and appeals and eminent domain proceedings prevent a final accounting of additional work incurred during such applicable period from being conducted in a timely manner, the Government shall conduct an interim accounting of additional work incurred during such applicable period and furnish the Non-Federal Sponsor with written notice of the results of such interim accounting. Once all outstanding relevant claims and appeals and eminent domain proceedings are resolved, the Government shall amend the interim accounting of additional work incurred during such applicable period to complete the final accounting of additional work incurred during such applicable period and furnish the Non-Federal Sponsor with written notice of the results of such final accounting. Such final or interim accounting, as applicable, shall determine the Government's total financial obligations for



additional work incurred during the applicable period and the Non-Federal Sponsor's contribution of funds provided thereto as of the date of such accounting.

a. Should the final or interim accounting, as applicable, show that the total obligations for additional work incurred during the applicable period exceed the total contribution of funds provided by the Non-Federal Sponsor for such additional work, the Non-Federal Sponsor, no later than 90 calendar days after receipt of written notice, shall make a payment to the Government in an amount equal to the difference by delivering a check payable to "FAO, USAED, Honolulu" to the District Engineer or by providing an Electronic Funds Transfer in accordance with procedures established by the Government.

b. Should the final or interim accounting, as applicable, show that the total contribution of funds provided by the Non-Federal Sponsor for additional work during the applicable period exceeds the total obligations for such additional work, the Government, subject to the availability of funds, shall refund the excess to the Non-Federal Sponsor no later than 90 calendar days after providing written notice. In the event funds are not available to refund the excess to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund. To the extent that such appropriations are not received, the Government shall apply the excess toward the Non-Federal Sponsor's upcoming installment payment, if any, in accordance with paragraph E. of this Article.

## ARTICLE VII - DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties each shall pay an equal share of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

## ARTICLE VIII - OPERATION AND MAINTENANCE

A. The Government, subject to the availability of funds and as it determines necessary, shall operate and maintain the *general navigation features*. However, the Government and the Non-Federal Sponsor acknowledge and agree that the Government shall have no responsibility for the operation and maintenance of the Kekaha County Landfill, Kikiaola Beach, and the Kikiaola Land Company Property dredged or excavated material disposal facilities at Kekaha, Island of Kauai.

B. The Non-Federal Sponsor hereby authorizes the Government to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor now or hereafter owns or controls for the purpose of operating and maintaining the *general navigation features*.

However, nothing contained herein shall convey to the Government any interest in real property owned or controlled by the Non-Federal Sponsor.

C. The Non-Federal Sponsor hereby authorizes the Government to perform all activities on the lands, easements, and rights-of-way provided by the Non-Federal Sponsor to enable the disposal of dredged or excavated material that, in the Government's sole discretion, are necessary for the operation and maintenance of the *general navigation features*. Such activities include, but are not necessarily limited to, construction or operation and maintenance of the *dredged or excavated material disposal facilities* and management of disposal of dredged or excavated material associated with construction or operation and maintenance of the other *general navigation features*. In addition, as between the Government and the Non-Federal Sponsor, for so long as a *dredged or excavated material disposal facility* is required for construction or operation and maintenance of the other *general navigation features* as determined by the Government, the Government shall have the full authority and exclusive right to operate and maintain or manage such facility including the exclusive right to place, remove, use, or reuse the materials therein for any purpose without charge to the Government.

D. Subject to applicable Federal laws and regulations and for so long as the *Project* remains authorized, and commensurate with the Government's operation and maintenance of the *general navigation features*, the Non-Federal Sponsor, at no cost to the Government, shall operate and maintain or cause to be operated and maintained the *local service facilities* in a manner compatible with the authorized purposes of the *Project* including dredging, excavation, and disposal of material therefrom. The Non-Federal Sponsor shall be responsible for taking all actions to enable such operation and maintenance.

#### ARTICLE IX - HOLD AND SAVE

Subject to the provisions of Article XXI of this Agreement, the Non-Federal Sponsor shall hold and save the Government free from all damages arising from construction or operation and maintenance of the *Project*, any *betterments*, and the *local service facilities*, and the provision of capacity pursuant to Article II.M.3. of this Agreement, except for damages due to the fault or negligence of the Government or its contractors.

#### ARTICLE X - MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the Non-Federal Sponsor shall develop procedures for keeping books, records, documents, or other evidence pertaining to costs and expenses incurred pursuant to this Agreement. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 32 C.F.R. Section 33.20. The Government and the Non-Federal Sponsor shall maintain such books, records, documents, or other evidence in accordance with these procedures and for a minimum of three years after completion of the accounting for which such books, records, documents, or other evidence were

required. To the extent permitted under applicable Federal laws and regulations, the Government and the Non-Federal Sponsor shall each allow the other to inspect such books, records, documents, or other evidence.

B. In accordance with 32 C.F.R. Section 33.26, the Non-Federal Sponsor is responsible for complying with the Single Audit Act Amendments of 1996 (31 U.S.C. Sections 7501-7507), as implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph shall be allocated in accordance with the provisions of OMB Circulars A-87 and A-133, and such costs as are allocated to the *general navigation features* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. Section 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor is required to conduct under the Single Audit Act Amendments of 1996. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. A-87 and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

## ARTICLE XI - FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government agree to comply with all applicable Federal and State laws and regulations, including, but not limited to: Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d) and Department of Defense Directive 5500.11 issued pursuant thereto; Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army"; and all applicable Federal labor standards requirements including, but not limited to, 40 U.S.C. 3141-3148 and 40 U.S.C. 3701-3708 (revising, codifying and enacting without substantive change the provisions of the Davis-Bacon Act (formerly 40 U.S.C. 276a *et seq.*), the Contract Work Hours and Safety Standards Act (formerly 40 U.S.C. 327 *et seq.*) and the Copeland Anti-Kickback Act (formerly 40 U.S.C. 276c)).

## ARTICLE XII - RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

B. In the exercise of its rights and obligations under this Agreement, neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights the other party may have to seek relief or redress against that contractor either pursuant to any cause of action that the other party may have or for violation of any law.

### ARTICLE XIII - OFFICIALS NOT TO BENEFIT

No member of or delegate to the Congress, nor any resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

### ARTICLE XIV - TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend future performance under this Agreement unless he determines that continuation of work on the *general navigation features* is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the *Project*.

B. If the Government determines that Federal funds for the *Project* are not sufficient to meet the Federal share of the costs of work on the *Project* in the then-current or upcoming *fiscal year*, the Government shall so notify the Non-Federal Sponsor in writing, and 60 calendar days thereafter either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient Federal funds for the *Project* or until either the Government or the Non-Federal Sponsor elects to terminate this Agreement, whichever is earlier.

C. In the event that either party elects to terminate this Agreement pursuant to this Article or Article XV.D. of this Agreement, both parties shall conclude their activities relating to the *Project* and conduct an accounting in accordance with Article VI.C. of this Agreement, or an accounting in accordance with Article VI.D. of this Agreement, as applicable.

D. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XV.D. of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13 week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3 month period if the period of delinquency exceeds 3 months.

## ARTICLE XV - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the Non-Federal Sponsor shall perform, or ensure performance of, any investigations for hazardous substances that the Government or the Non-Federal Sponsor determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA") (42 U.S.C. Sections 9601-9675), that may exist in, on, or under lands, easements, and rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be necessary for construction or operation and maintenance of the *general navigation features*. However, for lands, easements, and rights-of-way that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Non-Federal Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction.

1. All actual costs incurred by the Non-Federal Sponsor for such investigations for hazardous substances that are determined by the Government to be attributable to the *general navigation features* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

2. All actual costs incurred by the Government for such investigations for hazardous substances that are determined by the Government to be attributable to the *general navigation features* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

B. The Non-Federal Sponsor shall perform, or ensure performance of, any investigations it determines to be necessary to identify the existence and extent of any hazardous substances regulated under CERCLA that may exist in, on, or under lands, easements, and rights-of-way necessary solely for construction or operation and maintenance of the *local service facilities*. However, for any of those lands that the Government determines to be subject to the navigation servitude, the Non-Federal Sponsor must obtain prior written instructions from the District Engineer regarding the method of testing and must perform such investigations only in accordance with those instructions. The costs of any investigations performed under this paragraph shall be borne entirely by the Non-Federal Sponsor. The Government shall have no obligation under this Agreement for the costs of any investigations performed under this paragraph.

C. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be necessary for construction or operation and maintenance of the *general navigation features*, the Non-Federal Sponsor and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other, and

the Non-Federal Sponsor shall not proceed with the acquisition of the real property interests until the parties agree that the Non-Federal Sponsor should proceed. In the event it is discovered through any means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way necessary for construction or operation and maintenance of the *local service facilities*, the Non-Federal Sponsor and the Government, in addition to providing any other notice required by applicable law, shall provide prompt written notice to each other.

D. The Government and the Non-Federal Sponsor shall determine whether to initiate construction or operation and maintenance of the *general navigation features*, or, if already in construction or operation and maintenance of the *general navigation features*, whether to continue with construction or operation and maintenance of the *general navigation features*, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be necessary for construction or operation and maintenance of the *general navigation features*. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction or operation and maintenance of the *general navigation features* after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination. Such costs shall not be considered a part of *total costs of construction of the general navigation features*. In the event the Non-Federal Sponsor fails to provide any funds necessary to pay for cleanup and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government, in its sole discretion, may either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the *general navigation features*. The Government shall have no obligation under this Agreement for the costs of any cleanup and response, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination, on lands, easements, or rights-of-way necessary solely for the *local service facilities*.

E. The Non-Federal Sponsor and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary cleanup and response costs as defined in CERCLA. Any decision made pursuant to paragraph D. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

F. To the maximum extent practicable, the Government and the Non-Federal Sponsor shall perform their responsibilities under this Agreement in a manner that will not cause liability to arise under CERCLA.

## ARTICLE XVI - NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally or sent by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Non-Federal Sponsor:

Chairperson  
Department of Land and Natural Resources  
State of Hawaii  
869 Punchbowl Street  
Honolulu, Hawaii 96813

Administrator  
Division of Boating and Ocean Recreation  
333 Queen Street, Suite 300  
Honolulu, Hawaii 96813

If to the Government:

District Engineer  
U.S. Army Corps of Engineers, Honolulu District  
Building 230  
Ft. Shafter, Hawaii 96858-5440

B. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

## ARTICLE XVII - CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

## ARTICLE XVIII - HISTORIC PRESERVATION

A. The Government, as it determines necessary for the *Project*, shall perform any identification, survey, or evaluation of historic properties.

1. Any costs of identification, survey, and evaluation of historic properties determined by the Government to be attributable to construction of the *general navigation*

*features* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

2. Any costs of identification, survey, and evaluation of historic properties determined by the Government to be attributable to operation and maintenance of the *general navigation features* shall be considered financial obligations for operation and maintenance of the *general navigation features* and shared in accordance with Article II.I. of this Agreement.

B. The Government, as it determines necessary for the *Project*, shall perform any archeological data recovery activities associated with historic preservation. As specified in Section 7(a) of Public Law 86-523, as renumbered and amended by Public Law 93-291 (16 U.S.C. Section 469c(a)), the costs of archeological data recovery activities associated with historic preservation shall be borne entirely by the Government and shall not be included in *total costs of construction of the general navigation features*, up to the statutory limit of one percent of the total amount authorized to be appropriated to the Government for the *general navigation features*.

C. The Government shall not incur costs for archeological data recovery activities that exceed the statutory one percent limit specified in paragraph B. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit (and the Secretary of the Interior has concurred in the waiver) in accordance with Section 208(3) of Public Law 96-515, as amended (16 U.S.C. Section 469c-2(3)).

1. Any costs of archeological data recovery activities that exceed the one percent limit and are determined by the Government to be attributable to construction of the *general navigation features* shall be included in *total costs of construction of the general navigation features* and shared in accordance with the provisions of this Agreement.

2. Any costs of archeological data recovery activities that exceed the one percent limit and are determined by the Government to be attributable to operation and maintenance of the *general navigation features* shall be considered financial obligations for operation and maintenance of the *general navigation features* and shared in accordance with Article II.I. of this Agreement.

## ARTICLE XIX - THIRD PARTY RIGHTS, BENEFITS, OR LIABILITIES

Nothing in this Agreement is intended, nor may be construed, to create any rights, confer any benefits, or relieve any liability, of any kind whatsoever in any third person not party to this Agreement.

## ARTICLE XX - NON-LIABILITY OF OFFICERS AND EMPLOYEES

No officer, agent, consultant, or employee of the Non-Federal Sponsor, nor any officer, agent, consultant, or employee of the Government, may be charged personally, or held liable,



under the terms or provisions of this Agreement because of any breach, attempted breach, or alleged breach thereof, except as provided in Section 912(b) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (42 U.S.C. 1962d-5b note), or other applicable law.

#### ARTICLE XXI - OBLIGATIONS OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the Legislature of the State of Hawaii, where creating such an obligation would be inconsistent with Article VII, Section 5 of the Constitution of the State of Hawaii.


B. The Non-Federal Sponsor intends to fulfill its obligations under this Agreement. The Non-Federal Sponsor shall include in its budget request or otherwise propose appropriations of funds in amounts sufficient to fulfill these obligations for that biennium, and shall use all reasonable and lawful means to secure those appropriations. The Non-Federal Sponsor reasonably believes that funds in amounts sufficient to fulfill these obligations lawfully can and will be appropriated and made available for this purpose. In the event funds are not appropriated in amounts sufficient to fulfill these obligations, the Non-Federal Sponsor shall use its best efforts to satisfy any requirements for payments or contributions of funds under this Agreement from any other source of funds legally available for this purpose. Further, if the Non-Federal Sponsor is unable to fulfill these obligations, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

#### ARTICLE XXII - WATER QUALITY CERTIFICATION

Notwithstanding any provision of this Agreement, no construction shall commence on this Project until a satisfactory Environmental Protection Plan is submitted to the Department of Health of the State of Hawaii, as required by the water quality certification issued by said Department pursuant to Section 401 of the Federal Water Pollution Control Act (33 U.S.C. 1341).

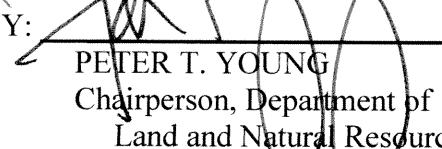
IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

BY:   
For DAVID E. ANDERSON  
Lieutenant Colonel, Corps of Engineers  
District Engineer  
Honolulu Engineer District

DATE: 8 AUG 05

STATE OF HAWAII


BY:   
PETER T. YOUNG  
Chairperson, Department of  
Land and Natural Resources

DATE: AUG - 8 2005

## CERTIFICATE OF AUTHORITY

I, Mark J. Bennett, do hereby certify that I am the principal legal officer of the State of Hawaii, that the State of Hawaii is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the State of Hawaii in connection with the Navigation Improvements at Kikiaola Light Draft Harbor on the Island of Kauai, Hawaii, and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611, as amended (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the State of Hawaii have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this  
5<sup>th</sup> day of August.

  
\_\_\_\_\_  
MARK J. BENNETT  
Attorney General  
State of Hawaii

## CERTIFICATION REGARDING LOBBYING

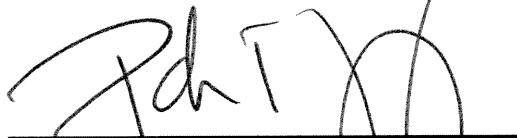
The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying", in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.



PETER T. YOUNG

Chairperson, Department of Land and Natural Resources  
State of Hawaii

DATE: AUG - 8 2005